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Non-delegable duty after Tiong Aik

By Low Kee Yang and Ian Mah Hao Ran

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Introduction

It is established law that, outside of vicarious liability, a person who has a duty of care may delegate his task along with the duty (or responsibility) to another person and, so long as he appoints his representative with care, he is not be liable for his representative's negligence. However, there are exceptions to this general principle; in some instances, the duty is said to be non-delegable. The subject of non-delegable duty has troubled courts for some time and attempts to construct a unifying theory have not met with much success, certainly not until the UK Supreme Court decision in *Woodland v Swimming Teachers Association*.¹ There, Lord Sumption JSC sought to rationalise the piecemeal development of the law and provided a reasonably coherent and robust framework.

In MCST No 3322 v Tiong Aik Construction Pte Ltd ("Tiong Aik")², Singapore's apex court had the opportunity to deliberate upon this difficult subject and in particular the recent *Woodland* framework. This case comment examines the decision, the law emanating from it and the lingering difficulties and challenges.

High Court Decision

In the High Court,³ the Management Corporation ("MCST") of The Seaview condominium sued the Developer, the Main Contractor, the Architect and the Mechanical and Electrical Engineer for certain defects or deficiencies, namely incomplete fibre optic cabling, the nuisance of small leaves falling into the pool and foul smell from the plumbing and sanitary system.

The High Court held that the independent contractor defence availed.⁴ It found that:

- the Main Contractor and the Architect were independent contractors of the Developer;
- the Main Contractor's 21 sub-contractors were independent contractors, and
- two companies Squire Mech and Sitectomix were independent contractors of the Architect.

The Court also found that the defendants had carried out the relevant due diligence in appointing the independent contractors. It also held that the defendants were not under a non-delegable duty.

The MCST appealed, but only as against the Main Contractor and the Architect. In the course of the appellate proceedings, the focus was narrowed down to whether the Main Contractor and the Architect owed the MCST non-delegable duties under common law to build and design The Seaview with reasonable care.

Court of Appeal Decision and Reasoning

The Court of Appeal decided that the respondents did not owe the MCST non-delegable duties. In a nutshell, the Court found that the case did not come within any of the established categories of non-delegable duties, and neither were the *Woodland* requirements satisfied. The court also saw no reason, on the factual scenario, to create a new category of non-delegable duty.

Justice Chao Hick Tin, delivering the judgment of the Court,⁵ began his analysis of non-delegable duty with a reminder that tort liability is fundamentally fault-based and that “a person is generally only held liable for his **own** carelessness, and not the carelessness of **others**”.⁶ He also noted how vicarious liability stood as a “true exception” to this principle. He further noted⁷ that there may be non-delegable duty where one has a personal duty and observed that this duty to ensure that care is taken is not equivalent to strict liability. Justice Chao rounded off his prelude with the oft-repeated truism that vicarious liability involves secondary liability whilst non-delegable duty involves primary liability, and the two doctrines are separate and distinct.

(The honourable Judge proceeded to consider the matter of statutory non-delegable duty, an issue the appellant’s counsel had opted not to pursue.)⁸

Moving on, Justice Chao catalogued the discrete instances⁹ of non-delegable duty at common law, namely employee safety, hospitals, schools and extra-hazardous operations, and cautioned that it is for Singapore courts to decide in each of these instances whether to follow the lead of other jurisdictions.

On the matter of a unifying theory for non-delegable duty, his honour referred to various theories or concepts canvassed in various jurisdictions, including vulnerability, dependence, control and assumption of responsibility before arriving at the landmark *Woodland* decision and Lord Sumption’s five defining features of non-delegable duties, namely:

- a. the claimant is especially vulnerable or dependent on the protection of the defendant against risk of injury;
- b. there is an antecedent relationship between the claimant and the defendant which places the claimant in the custody, care or charge of the defendant and from this relationship (which characteristically involves control) the defendant has assumed a positive duty to protect the defendant from harm;
- c. the claimant has no control over how the defendant chooses to perform those obligations;
- d. the defendant delegated to a third party an integral part of the positive duty; and
- e. the third party has been negligent in the performance of the very function which was delegated.

Justice Chao then remarked that Lord Sumption's framework was "a good starting point" for the development of non-delegable duties in Singapore and declared that henceforth a claimant must "minimally" show that his case either falls within the established categories of non-delegable duty or possesses all of the five *Woodland* features. After these "threshold" requirements are satisfied, the Court has still to decide whether it is fair and reasonable to impose a non-delegable duty in the circumstances and take into account policy considerations.

Finally, his honour reiterated¹⁰ that non-delegable duties are exceptional and the development of new instances of non-delegable duty should be done analogically and cautiously, bearing in mind Gleeson CJ's observation in *Leichhardt*¹¹ that non-delegable duties are in many instances duties which the duty-bearer cannot fulfil.

Applying the *Woodland* framework to the case before him, Justice Chao was of the view that several of the key features were not satisfied.

In the first place, the MCST was not in any sense in the "custody, care and charge" of the respondents. Elaborating on the aspect of control, his honour remarked¹² that '[t]he most that could be said was that the Main Contractor and/or the Architect undertook their roles in the construction project **reasonably foreseeing** that any negligence by it or its sub-contractors may cause harm to the MCST. This falls far short of the type of custodial relationships necessary to give rise to non-delegable duties.'

Secondly, Justice Chao found that the MCST was not especially vulnerable or dependent on the protection of the respondents against the risk of injury¹³. He noted¹⁴ that the MCST had alternative avenues of recourse, including a breach of contract claim against the Developer and a claim under contractual warranties against the Main Contractor.

The third reason is slightly complicated. Essentially, the argument¹⁵ is that if the Developer wanted to sue the Main Contractor or the Architect in tort, its claim would fail since the commercial understanding was that the Developer should proceed against the relevant sub-contractor under the warranty certificates issued by the latter. So, according to Justice Chao, if the Developer could not successfully sue the Main Contractor or the Architect in tort, then neither could MCST, the 'successor' of the Developer.

Justice Chao then considered whether, as a matter of policy, the court should develop a new category of non-delegable duty in relation to construction professionals. The appellant had put forward several policy reasons but his honour found none of them compelling. The first – industry practice and expectations that the builder and/or the architect would take responsibility for all building defects – his honour thought was unsubstantiated. His honour found the second reason – simplifying the legal process for the MCST¹⁶ – more compelling but remarked¹⁷ that "this was part and parcel of any litigation and was an ordinary risk endemic in any investment, including the purchase of a property". Finally,¹⁸ Chao JA thought the appellant's argument that there may be insufficient proximity between the MCST and the negligent sub-contractors was "completely unfounded".¹⁹ He then made the concluding remark²⁰ that given the increasing specialisation in the construction industry, which necessitated sub-contracting, it would be "excessively onerous" to impose non-delegable duty.

Hence, the Court found no non-delegable duty on the respondents' part.

Comments and Thoughts

As always, an observer would have at least two concerns – the law (and its development) and justice on the facts. In this case, the two are intertwined.

As regards the law, the Court of Appeal's position and stance is broadly in accord with what is taking place in other jurisdictions. Post-*Tiong Aik*, the Singapore position on non-delegable duty appears to be as follows:

- a. In general, a person who has a duty of care can delegate that duty, and so long as he appoints his representative with care, he will not be liable even if the representative was negligent;
- b. However, where the representative is an employee, he may be liable under the doctrine of vicarious liability;
- c. In contrast, if the representative is an independent contractor, he will generally not be liable. Exceptionally, he may have a non-delegable duty. The exceptions are:
 - i. where the case falls within one of the established instances of non-delegable duty (such as schools or hospitals);
 - ii. where all the *Woodland* features are present *and* where it is just and reasonable, taking into account policy considerations, to impose a non-delegable duty;
 - iii. where the defendant is under a personal duty; and
 - iv. in new scenarios, where the Courts, proceeding cautiously and by clear analogy to an existing category of non-delegable duty, decide to impose such a duty where the case is very compelling;²¹
- d. Tort law is fault-based and a person who carefully delegates to an independent contractor has no fault and hence should not be liable for the contractor's negligence;
- e. There is no exclusionary rule, as regards non-delegable duty, in respect of pure economic loss²²; and
- f. There is, in general,²³ no non-delegable duty in respect of construction professionals.

To be sure, the Court of Appeal in *Tiong Aik* has provided a very good excursus of the law and has clearly stated the Singapore position on the subject. But whether the current law²⁴ is fully rational and just is another matter and there is more than meets the eye. In the following paragraphs, the writers set forth the essence of the various doubts and challenges in this controversial area.

In the first place, if one were to examine the matter closely, it is far from certain that the default position in law should be that a duty of care is, in general, delegable. If I ask someone to perform a task which is essentially mine, it seems logical and sensible that vis-à-vis the person to whom I owe the duty, I am responsible for the task being performed with care. The position is quite different if the beneficiary of the duty knows and expects that I am so delegating. The common law could just as well have developed along the line that a duty of care is, in general, non-delegable and that only exceptionally (such as where the defendant lacked the expertise or where the claimant had agreed to the delegation) can the duty be delegated.

Related to this is the uncomfortable fact that vicarious liability looks very similar²⁵ to non-delegable duty despite the strenuous efforts to make supposedly vital distinctions between the two. The reality is that both vicarious liability and non-delegable duty are ways by which the law imputes liability to the defendant. It appears simplistic, particularly in this current business environment of increased outsourcing, to say that a defendant is liable if he engages an employee but not if he engages an independent contractor. Furthermore, the difference between an employee and an independent contractor is, sometimes, just a fine line.

Another difficult piece of the jigsaw is that where the defendant engages an independent contractor, apart from the duty to act with care in appointing or selecting the contractor, theoretically, there may be, depending on the circumstances, a duty to supervise²⁶ the contractor. But clear authority in support of a principle of a duty to supervise is remarkably hard to find, as witness the statement of *Markesinis & Deakins*²⁷ that “there may even be some scattered dicta in our case law supporting, in some instances, primary duties of supervision.” As a simple example, suppose shortly after the contractor commencing work, the defendant learns that the contractor not so competent or not so careful. Surely, in such a circumstance, there is a primary duty, on the defendant’s part, to supervise the contractor. It is observed that the term “supervise” made a brief appearance in the penultimate paragraph of the Court of Appeal’s judgment in *Tiong Aik*. In the writers’ view, if the law on supervision were sufficiently robust, then the worries over the potential injustice of delegability would be much reduced.

Yet another difficulty is how non-delegability meshes with ideas of agency and authority. Take, for example, the following statement from *Bowstead & Reynolds on Agency*:

A principal is liable for the loss or injury caused by the tort of his agent, whether or not his agent, whether or not his servant, and if not his servant, **whether or not an independent contractor** ... (a) if the wrong was specifically instigated, authorised or ratified by the principal. (emphasis added)

The further question is how to draw the line between authorisation and the absence of authorisation. In this regard, it is noted that in the High Court in *Tiong Aik*, the judge commented²⁸ that there was no evidence that the Architect “condoned” the contractor’s negligent acts. The point here is that agency jurisprudence can be and, in appropriate situations, should be resorted to in order to mitigate the harshness of the general rule of delegability.

Next, the issue of policy considerations and what is fair and reasonable. On this subject, the Court of Appeal concluded that it would be excessively burdensome to impose non-delegable duties on the Main Contractor and the Architect. But there are other perspectives. Tort law, as CJ Chan reminded in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte*,²⁹ emphasises victim compensation. Take the scenario of the purchaser of an apartment in a condominium project. His primary concerns include the location, the pricing and the developer. He typically has little or no knowledge of or interest in who the other participants of the development are. He is attended to by a sales staff (whom he perceives to be a representative or employee of the Developer) at the showroom, and who assures him on all his queries about fittings, facilities and all other matters. He proceeds to purchase the apartment. Subsequently, when defects are discovered and he makes a claim in negligence

against the Developer, the Developer answers him with a simple defence of delegation and a direction to seek out the contractors and sub-contractors.

Consider another scenario, which is commonplace. An owner of an apartment desires to carry out renovations and engages a renovation contractor. They discuss the various aspects, such as structural changes, electrical wiring, tiling and painting and agree on price and completion date, amongst other things. The reality is that for some of the aspects the contractor uses his own employees and on others he hires an independent contractor. However, in the event that any aspect turns out unsatisfactory, the owner looks to the (main) contractor, who is expected to remedy or compensate. It would be quite ludicrous if when faced with the owner's claim, whether in tort or in contract, the contractor could simply reply: "Oh, for each of these alleged defects, you have to pursue the sub-contractors and here is the list."

Does the legal position mesh with the reality and the legitimate expectations of purchasers? Is it fair and reasonable? As Lady Hale reminded in *Woodland*, the law must make sense to the ordinary person and not perplex the man on the underground³⁰. An ordinary home owner would find it perplexing and illogical that he must hunt down the specific sub-contractor. The writers submit that imposing a non-delegable duty on the Developer, the Main Contractor or the Architect would not impose an excessive burden on them. The commercial reality is that they can easily obtain indemnities and other security from parties to whom they delegate their tasks. And it is unreasonable that the purchasers, through their proxy the MCST, have to seek out the sub-contractors and risk the prospect of these sub-contractors being unwilling or unable to pay. In the event the sub-contractor fails to pay, it is a weak reply to say that this was "an ordinary risk endemic in any investment".³¹

One rationale of vicarious liability is that employers have the financial capability to compensate the victim as compared to their employees.³² Similarly for non-delegable duties, could it not be said that the victim should not be left without recourse and should be able to sue the party who has benefitted from the independent contractor's action? In this regard, one should note the point made by Lady Hale in *Woodland*, that arguments such as ability to pay – as an objection against non-delegable duty – "scarcely apply in today's world where large organisations may well outsource their responsibilities to much poorer and un- or under-insured contractors".

Also, it is submitted, the fact that a victim may have a contractual claim is not itself sufficient reason to deny him an alternative claim in tort.

A final point – Justice Chao remarked³³ that the position of the MCST should not be any better than the Developer as after all, they are the successor of the Developer. It is noted that the developer assists in forming the first MCST. However, it would then be subsequently handed over to the owners upon conclusion of the first annual general meeting. Thus, it would be artificial to regard the eventual MCST as the successor of the Developer and deny compensation on that ground.

Thus, for a variety of reasons, the legal framework of non-delegable duty in general and its application to the construction scenario in particular involves issues and complexities that remain unresolved.

Conclusion

The Court of Appeal has provided clarity on the controversial subject of non-delegable duty. In so doing it has reaffirmed the conventional position that a duty of care is, in general, delegable and that non-delegable duty is exceptional and should not be imposed unless there are very compelling reasons to do so. More specifically, it has endorsed the *Woodland* criteria as threshold requirements for the ascertainment of such a duty and stipulated the further need to consider whether it is just and reasonable, taking into account policy matters. The court also declined to create a new category of non-delegable duty for construction professionals.

As explained above, while the *Tiong Aik* decision is within the realms of precedent and convention, there are difficult questions as to whether the law on non-delegable duty is truly just or justifiable. It would not surprise a hypothetical purchaser or the man in the street finds the current law perplexing.

Postscript:

In the recent SCA decision *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58 (judgment issued on 26 September 2017), the subject of non-delegable duty was touched upon. Essentially, the Court endorsed *Woodland* and much of what was said in *Tiong Aik*. As regards the specific category of ultra-hazardous acts, it favoured the Biffa Waste approach (“exceptionally dangerous whatever the precautions are taken”) over the Honeywill approach (“dangerous operation in its intrinsic nature”). Menon CJ delivered the judgment.

Footnotes

1. [2013] 3 WLR 1227.
2. [2016] SGCA 40.
3. MCST No. 3322 v Mer Vue Developments [2016] SGHC 38.
4. The Mechanical and Electrical Engineer, Squire Mech, did not plead the independent contractor defence.
5. The other members of the panel were Andrew Phang and Steven Chong JJA.
6. At [19].
7. At [21]-[24].
Essentially, Justice Chao expressed the view that a statute can give rise to non-delegable duties in tort, but in the instant case, the Building Control Act did not impose non-delegable duties other than for structural soundness and safety, which did not apply to the case at hand.
8. In *Woodland*, Lord Sumption mentioned another category: prisoners.
9. At [63].
10. *Leichhardt Municipal Council v Montgomery* [2007] 230 CLR 22 at [23].
11. At [79].
12. In this case, the risk of pure economic loss arising from building defects.
13. At [80].
14. At [81]-[82].

16. By removing the need for protracted pre- or post-action commencement discovery to identify the correct defendants: see [83].
17. At [89].
18. The appellant's third reason – the fact that larger, well-insured organisations have started outsourcing their duties to poorer and under-insured sub-contractors – was not addressed by the court.
19. At [89].
20. At [90].
21. See especially [63] and [86].
22. At [69]-[70].
 Although it seems implicit from the *Tiong Aik* judgment that, in the light of the Building Construction Act, the Main Contractor and the Architect have a statutory non-delegable duty in respect of structural soundness and safety: see [35]-[41]. If so, it is arguable that they are also a common law non-delegable duty in respect of structural soundness and safety.
 The High Court in *MCST No. 3322 v Mer Vue Developments* [2016] SGHC 38 (“*Mer Vue*”) and *Ng Huat Seng v Munib Mohammad Madni* [2016] SGHC 118 (“*Ng Huat Seng*”) discussed non-delegable duties for construction professionals, prior to *Tiong Aik*. Both cases discussed the Woodland framework and the difficulty in this area of law, albeit not in great detail. *Chan Seng Onn* J in *Mer Vue* opined that non-delegable duties for construction professionals might belong to a separate third category while *See Kee Oon JC* in *Ng Huat Seng* suggested dealing with non-delegable duties under the general framework of negligence. However, both suggestions were not picked up by the Court of Appeal in *Tiong Aik*.
23. In the words of the Lunney & Oliphant, *Tort Law: Text & Materials*, OUP, 5th ed at p.843, ‘they share more than a functional equivalence’. In similar vein, the authors of *Markesinis & Deakin's Tort Law*, OUP, 7th ed (at pp 587-588) explore the increasing possibility of the integration of an employer's personal and vicarious liability.
24. Of course, if the situation was more grave, he may have to terminate the contractor hire another one in his place.
25. *Markesinis & Deakin's* at p 585, citing Lord Bridge in *D & F Estates Ltd v CCE* [1989] AC 177, 209. It is interesting to note that the American Restatement (Second) on Torts at section 409 says that an employer who is negligent in supervising his independent contractor may be liable for the torts committed by that contractor.
26. At [108].
27. [2011] 3 SLR 540.
28. The London underground public rapid transit system, that is. Lady Hale was quoting Lord Steyn's observation in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 495.
29. At [89].
30. Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 19.005.
31. At [82].
- 32.
- 33.

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